No. 8413.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

MRS. ADAH ALBERTY, trading as ALBERTY FOOD LABORATORIES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT, ADAH ALBERTY.

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TABLE OF AUTHORITIES CITED.

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The appellant, Adah Alberty, respectfully contends that by her opening brief she demonstrated that the record abounded with prejudicial reversible error. The specifications of error set forth in her opening brief, together with ample reference to the pertinent portions of the printed transcript and authorities cited do logically and conclusively show, we respectfully submit, that the judgment appealed from should and must be reversed.

A careful examination of the appellee's brief in reply thereto indicates that the Government has apparently been unable to and has noticeably failed to answer or refute the contentions, arguments and authorities presented in this appellant's opening brief. The Government has argued

by analogy and has in other instances relied upon the strict letter of the rules to avoid the necessity of answering or refuting the contentions of the appellant. It has nowhere refuted any authority presented. By reason thereof we respectfully urge that while the appellee's brief is adroitly and cunningly compiled, it manifestly appears that the Government has been unable to justify the judgment and it tacitly admits the weakness of its position on appeal.

Statement of Facts.

The principal material facts as disclosed by the evidence have been fully, fairly and accurately stated in our opening brief, pages 1-33 thereof. The correctness thereof has nowhere been challenged, the Government merely printing the several labels as disclosed by the information in the several counts and giving an analysis of Calcatine and Liver Cell Salts, and has augmented our statement by giving the testimony of allopathic physicians in greater detail. In addition thereto the Government has printed some of the testimony of Dr. Clark and Dr. Shepperd, but it has nowhere denied that our statement of the facts was substantially correct. We have no quarrel with the portions of the transcript quoted in the Government's statement and set forth in its brief. We believe they have properly quoted from the Bill of Exceptions. We shall, therefore, proceed to answer the points raised by their reply. To preserve the chronological order of the appellee's brief in this reply, we shall answer their arguments in the order in which they appear in their own brief.

POINTS—AUTHORITIES—ARGUMENT

Reply to Appellee's Argument Answering Appellant's Argument on Page 75 of Appellant's Opening Brief.

In our opening brief we asked: "Did the prosecution prove beyond a reasonable doubt that the defendant was guilty of the violations charged in the several counts of the information?"

In answer thereto the Government has cited the case of *Love v. United States* (C. C. A. 9), 74 Fed. (2d) 988.

Now we are aware that the sufficiency of the evidence is not before the Court upon appeals in the ordinary case, if there was no motion made at the trial of the action for a directed verdict, but counsel has not distinguished his case from the rule laid down in *Wiborg v. United States,* 163 U. S. 632, cited by us in our appendix at page 84 of our opening brief. We might also point out that counsel has not denied the application, if appropriate, of the rule laid down in *Crawford v. United States,* 212 U. S. 183, wherein the Court said that in the exercise of a sound discretion the Appellate Court will notice error in the trial of a criminal case, even though the question was not properly raised at the trial by exception and objection. See, also, *Williams v. U. S.,* 66 Fed. (2d) 868, p. 869, and *Sunderland v. U. S.,* 19 Fed. (2d) 202, p. 216. We shall, therefore, address ourselves to an answer on this statement made by appellee that the summary showed abundant evidence that the statements on the labels were both false and fraudulent.

Now let us point out that Calcatine and Liver Cell Salts, under whatever name they were labeled and sold, admittedly were two well known and widely used homeopathic remedies. It is nowhere denied that these two

remedies were really homeopathic medicines which had been dispensed by homeopathy under the "ethical" names of Calcarea-phos and Natrum-sulph for many years, yea, well nigh a century. We submit that the defendant cannot be convicted of the crime with which she is charged upon the basis that she sold an accepted remedy under a new and coined name. We believe the Government would admit that such is not the basis of the charge on the first seven counts of the informatoin.

We have pointed out that the evidence showed that even the Government's own homeopathic expert, Dr. Edward P. Clark, testified that he had used these remedies and had used them in some of the ailments mentioned. It is true that he stated that the remedies would only have a therapeutic effect if prescribed by a physician. Now we are aware of the belief of the medical profession that all patent medicines are dangerous. In fact we believe that this Honorable Court will take judicial notice of such an attitude upon their part. In fact Dr. Clark stated that when a drug is put on the market with a label to cure certain diseases and it doesn't cure them all, it is absolutely false and is doing the patient a lot of harm; that such was his opinion as a physician and he stated, "all patent medicines come under that head." [Tr. p. 55.] We refer to his testimony because we believe that while his statements may have had their impression upon the jury, the essential portions of his testimony clearly disclose that there was no misbranding of the two products. There was no false and fraudulent claim made by the appellant. This is more readily disclosed when the defendant's exhibits are considered and the language of accepted authorities on homeopathy is read and the labels are considered in the light of the texts by leaders of

homeopathy used by appellant as bases for the claims made on her labels.

Dr. Shepherd did state that homeopathy prescribed for individuals, but he ridiculed the contention of Dr. Clark that a physician's prescription was the magic which created the therapeutic effect; that the physician's diagnosis was necessary. Dr. Shepherd stated that it is true that there is no drug which will cure every case of a given ailment, and we submit that the Court will take judicial notice of the fact that even the most widely known specifics used by the medical profession fail to cure every case of a given disease. Digitalis does not aid or is not a remedy in every case of heart trouble, yet it is a specific for heart ailments. Quinine is not a cure for every case of malaria, yet it is a specific in cases of malaria. Insulin does not aid every case of diabetes and yet it is a widely used specific in cases of diabetes. Therefore, we insist that to state that Dr. Shepherd's testimony must be taken in its entirety and when read in its entirety it merely states that the two remedies were used by him and that he had had actual experience in the success of these remedies in a number of the diseases or ailments mentioned on the labels.

The term, remedy, does not, of course, guarantee a cure. Neither does the phrase, uses or aids. It merely implies a curative tendency.

Bradley v. United States, 264 Fed. 79.

We submit as we did in our opening brief that it was not the intent of Congress to enter the field of medical controversy. We pointed that out in our opening brief *Seven Cases of Eckman's Alternative v. U. S. A.*, 239 U. S. 510. We cited this case at length in our opening brief. (Appendix p. 80.)

Now before the Government can prevail, the Government must first show that the statements are not true and then that they are fraudulently made. If a person makes a statement that is not true, but believes it to be true and is warranted by his information in making the statement, then it is not fraudulent.

United States v. Tuberclecide Co., 252 Fed. 938.

In the case cited above the defendant had four doctors who had advised him that a formula was good for tuberculosis. In the instant case the appellant had a number of leading text books by homeopaths that are shown by the uncontroverted evidence in this case to be accepted as standard texts in that branch of the medical profession. In the case cited above the Court held that it was not fraud for the defendant to act upon the advice of a doctor although other doctors disagreed with the one; that it was also immaterial that the defendant was not a doctor. Now we submit that the evidence disclosed in the case of *United States v. Tuberclecide Co.,* 252 Fed. 938, is distinctly analogous and that that decision is distinctly appropriate for citation in the instant case. We would point out that the fact that the Government has made a regulation, or that the Department of Food and Drug Administration has made a rule, does not change the act of Congress. Therefore, the fact that the "language was objectionable" to Mr. Larrick, or others of that personnel, is not material and is not cogent as showing a violation. The Government has not answered the authorities cited by us upon the proposition that the appellant had ample medical authority to support the claims made upon her labels of the two homeopathic remedies.

We shall proceed to discuss the contention that Alberty's Anti-Diabetic Vegetable Compound Capsules could not be effective in the treatment of diabetes.

Now it is conceded by all that there is no cure for diabetes. In that respect we can take the word of the allopathic physicians introduced by the Government as their own experts. It is a matter of common knowledge that the most that the doctor can do in cases of diabetes is to keep the patient in good health in spite of it. [See testimony of Dr. West, Tr. pp. 111-112.] Diabetes is "controlled" by diet regulation. The character of treatment for diabetes is a matter that is widely known by the laity. We believe the Court can take judicial notice of the manner of treatment except that as stated by Dr. West insulin has of recent years been added to the treatment where insulin is indicated or necessary.

Therefore, if the Anti-Diabetic Vegetable Compound could be said to be of any benefit at all in case of diabetes, it would answer the rule with respect to that ailment for it is admitted that diabetes is incurable.

In the case of an incurable ailment, if the medicine contains the same ingredients as those used in the treatment of the ailment, how can it fairly be asserted that there is anything false or fraudulent in the statements made by the manufacturer as they appear on the label.

United States v. Twenty-three and Seven-Twelfths Dozen Bottles, Thirty-five-cent Size, etc., 44 Fed. (2d) 831 (see p. 836.)

It is significant that none of the Government experts who testified upon any of the remedies had ever used them or conducted any experiments to show the effects. They gave their expert opinion based upon reading of books, not upon their own experience. We would point out that not a single Government expert did anywhere state that he had used any of the remedies and that they had no such therapeutic effect as claimed. Dr. Clark stated that he did not use them in every case of a given

disease, that he might use them in one case in a thousand, but still he would use them and he would use them in cases where the ailment was the same as mentioned on the label on the bottle.

It is significant that Government experts referred repeatedly to incurable diseases in connection with their testimony, when it has been well said that obviously it may be assumed that the most ignorant person would know that no medicine which science had discovered is capable of relieving a disease or symptom, whatever it may be called, produced sometimes by cancer, tuberculosis, pernicious anemia, or lead poisoning, etc., and the language may fairly be construed to mean those causes which would be curable in a particular ailment. Hence to contend that the appellant made a claim not supported by medical science where the ordinary individual is fully aware that there is no remedy or cure for such ailment, is to imply a meaning not intended by the appellant; a meaning that would not be ordinarily conveyed by it to those to whom it was addressed. The language is not to be given a fanciful meaning; it is not to be construed most strictly against the appellant, but in the light of common knowledge of even the most ignorant.

Chichester Chemical Co. v. United States, 49 Fed. (2d) 516.

The language is to be given the meaning ordinarily conveyed by it to those to whom it was addressed when so read.

Hall v. United States, 267 Fed. 795.

Judged by these standards, we submit the Government failed to prove that the labels on any of the remedies made false and fraudulent claims. Dr. Thiends and Dr. West tried to impress the jury that appellant was claiming a remedy for cancer by using the word "acidosis."

We Shall, Therefore, Proceed to Answer the Contention of the Government Where They Reply to Our Argument That the Court Erred in Allowing Appellant's Collateral Literature in Evidence.

It is the contention of the Government that since the intent of the party is a matter in issue, it is allowable to introduce evidence of other acts and doings of a party of a *kindred character* to establish the intent and motive of a particular act directly in judgment, quoting from the case of *Wood v. United States,* 16 Pet. 358. Now, we submit that we are familiar with that rule, but we likewise submit that the intent of the person to which the case cited refers is the fraudulent intent and it refers to acts of a "kindred character." Under such a rule the Government seeks to introduce into evidence booklets of which the appellant was the author as showing that it was her *intent to defraud* in making the claims upon the labels. If it is possible to read the literature of a manufacturer (where the same is not even contained within the label or package) to the jury, a manufacturer is liable to be convicted—not for the statement made upon the label, nor the import thereof conveyed to the public, but for claims made in a book published by the manufacturer which is not even sold or delivered with the article purchased. The rule has no such application nor was it intended to have such application.

Since one may not be convicted under the statute merely because he advocates a theory of medicine which has not received the sanction of the medical profession (*United States v. American Laboratories,* 222 Fed. 104) we submit that to introduce the theories of the defendant as disclosed by her literature was to place the theories of medicine of the defendant before the jury and to try her

for her theories of medicine and not for the statements on the labels.

We might point out that the Government throughout its case attempted to show by the testimony of Mr. Larrick and others that the Department of Food and Drugs had been corresponding with the defendant; had had conferences with her, all about her booklets, and that the Government succeeded in introducing into evidence testimony that her booklets were objectionable and introduced the booklets. That pointed to the same language in the booklets as appeared upon the labels in several instances as showing by analogy that if the booklets were objectionable, the defendant should have known that her labels were objectionable. In other words, the Government is not acting in good faith when it makes the statement that the evidence was introduced as tending *to show intent to defraud*. Mr. Purdue made the statement himself at the very outset of his case that it was offered to show "what the defendant meant" by the statement on her label. Unfortunately the colloquy between counsel was deleted by court instruction and was not available in the record as is the statement of the Court. The remarks of the Court appear under our second assignment of error at page 227 in the transcript where the Court stated that "undoubtedly it was used to further the sale or to explain, at least, or, rather, for the use of those who might be interested in buying the products. I take it that was the purpose of the document. It seems to be it would be admissible." Now we submit that no instruction to the jury, were one given at conclusion of the trial, could overcome that remark of the Court in causing the jury to conclude that the collateral advertising was material to the offense charged. We likewise would point out that none of the booklets are shown to have been distributed or sold with

the package. Even if there were false statements in the booklets, the statements are not in violation of the Food and Drug Act.

United States v. Newton Tea & Spice Co., 275 Fed. 394.

Since these statements do not constitute a violation of the law, we submit that they do not fall within the rule of *Wood v. United States,* or *Williamson v. United States,* cited on page 17 of appellee brief. Neither does the case of *Magon v. United States,* 260 Fed. 811, nor *Holmes v. Goldsmith,* 147 U. S. 150, apply. In some of the cases cited the charge was conspiracy. Certainly there is no charge of conspiracy involved here.

Neither can we see how the excerpts read about "June who since the age of two had not been robust, etc.," could have had any effect in proving the intent since they did not relate to the specific remedies here charged against the appellant. The only effect of the reading of the excerpts was to show that the appellant in her literature made claims deemed extravagant or inaccurate by the medical profession, and hence could only cause the jury to conclude that the appellant recklessly foisted upon an unsuspecting public a worthless remedy at a great price.

To get the views of the appellant on this point it is necessary to secure the picture as it was presented to the jury, something that cannot often be secured by an Appellate Court. The appellant came into Court charged with the misbranding of certain particular remedies. The prosecution was permitted as part of its case in chief to refer to testimony and acts of the defendant as late as 1934 as disclosed by the testimony of one Larrick; she was confronted with all of the several booklets she had published about numerous of her remedies; and even

though there was no showing that any particular booklet was picked up in any store selling her products at the time of the seizures, the Government was allowed without in any manner connecting it to the offenses charged to introduce them into evidence and to read material portions to the jury. We would point that the phrase "Alberty's Foods" and "Alberty's Treatment" appears in the quoted portions of the booklets. Yet in her endeavor to show her good faith with relation to the statements made in the booklets, we would point out that the evidence discloses that she was denied the opportunity. She was confined to testimony regarding the articles mentioned in the information.

The Court struck the testimony of Beatrice Lyon; the Court refused to permit Elwood Leon Rudolph, who had sold all of her products over a number of years, to testify regarding the other products and the statements of users thereof to him. [Tr. p. 129.] The Court refused to allow Beatrice Lyon to testify regarding complaints made, if any, by customers, or what customers said to her about different of the articles with which the appellant is charged with misbranding. While we are aware that ordinarily selfserving declarations are inadmissible, refusal to allow this testimony under all of the circumstances deprived the appellant of a substantial right. If it is to be conceded (as the Government contends) that the test of the good faith of the appellant is embraced in her advertising literature, then it was important in the protection of appellant's rights that the evidence offered by her of the character cited, of testimonials on the treatments she outlined in her literature, upon the use of others of her products mentioned therein, should have been allowed as tending to show that the literature was founded upon facts; as should the introduction of her testimonial

letters, testimonials, and all of her conferences with the Government. As it was the Court permitted the introduction of evidence that gave only half of the picture and that tended rather to confuse than to explain the issue. We, therefore, submit that our contention that the introduction of collateral advertising, together with the exclusion of testimony offered by the defendant in regard to it, constituted prejudicial error.

Chichester Chemical Co. v. United States, 49 Fed. (2d) 516, see pp. 518-519.

The advertising matter was not shown to be unlawful in any event.

In other words, the Government now contends that evidence (originally introduced to show the definition of diseases made by the appellant herself in her literature) was made to show the fraudulent intent of the appellant. At the same time the Government succeeded in excluding vital testimony upon this very bit of evidence when offered by the appellant. We, therefore, submit that the literature was not only inadmissible in the first instance for the purpose of showing the fraudulent intent of the defendant, even under the cases cited by the Government, but the Court did not so instruct the jury, in fact the Court's comment to the jury was that undoubtedly it was used to further her sales, and was introduced upon the theory that it was part of the offense. Not only was it inadmissible in the first instance, but after its admission the appellant was unfairly restricted in her attempt to prove that the literature was published also in good faith, notwithstanding the "expert" opinion of the allopathic physicians whose testimony the Government placed before the jury. It is well also to remember that these articles were not sold in drug stores or the usual channels where medicines, patent or otherwise, are dispensed, but in food and

health stores where people who are interested in the effects of elements of their diet go for remedies other than those dispensed by the allopaths. We believe that the Court can get something of the picture when we make that statement, that the Court can realize the unfairness of introducing the literature and then excluding vital testimony upon that literature when offered by the appellant. Since it was inadmissible upon any theory, and since the Court admitted it upon a different theory and not upon that which the Government now contends was the real reason it was admissible, we submit that its admission constituted prejudicial error as we have heretofore pointed out. For the appellant was not apprised of the purpose for its introduction which should have been restricted at the time.

While we are aware that it is the rule that the Court is assumed to have given proper instructions to the jury and that since she did not request further instructions, the appellant cannot now complain upon the instructions to the jury, we submit that in the light of the statement of the Court which was, of course, deleted by conference with the Court from our Bill of Exceptions, but which nevertheless appears in our assignments of error, and which were not challenged there prior to settlement of the bill, the introduction of the evidence cannot have failed to seriously have prejudiced the appellant upon the issue of her good faith.

We, Therefore, Proceed to Reply to the Argument That the Conduct of the Government Counsel Was Prejudicial.

This reply can be very brief. Counsel merely points out that since the defendant in error (the appellant here) offered herself as a witness, she subjected herself to the rules applicable to all witnesses and was subject to cross-

examination as to any matter to which she had testified on direct examination. We have no quarrel with the cases cited in support of that contention nor with that contention. We simply state that it does not apply. We merely point out that cross-examination must be held within the bounds of reason and to ask the appellant a question about *Alberty's Foods,* a product not here involved, when counsel knew that the statement he made in the form of a question was false and not made in good faith (and we challenge him to produce the records of the Los Angeles Health Department before this Honorable Court to show that he had any information to support his act), we cannot escape the conclusion that his zeal for conviction led him astray from his duty to fairly represent the Government in presenting the facts. We submit that no offer of evidence upon that score made by us could have erased from the minds of the jury that where there was some smoke there must be a bit of fire. The damage was done and nothing we could produce in the way of evidence would undo it. Certainly the denial of the appellant is not sufficient answer. Counsel was bound by the answers of the witness all right, but the jury was not so bound, and it is the effect upon the jury with which we are here concerned.

Counsel for the Government insists that the element of profit was also proper evidence and that where objections to the questions were sustained, it does not appear that we should be heard to complain. Now in a matter so fundamental, counsel's argument falls of its own weight for he repeated the offense even more times than appears in the Bill of Exceptions. He seeks to escape the effect thereof by pointing out that in several instances the assignments of error contained statements not included in the Bill of Exceptions. Nevertheless, he admits that he did

bring the element of profit in repeatedly, and we submit that notwithstanding the sustaining of objections to it by the Court, that act, coupled with the other acts complained of in our opening brief, warrant this Honorable Court in seriously considering our contention that Government counsel misconduct was highly prejudicial. We make this statement in the belief that Government counsel was swayed by his zeal in this case and not because of any personal animosity, yea, while even holding him in the highest regard. We believe, however, that a single instance, viz., the question he propounded about the "vomiting babies," would be sufficient to warrant a reversal.

We Shall Proceed to Reply to the Argument of Counsel Regarding the Conduct and Instructions of the Court.

We are aware that a broad latitude is allowed a trial court. We have no contention with cases cited on page 30 of appellee's brief. While we have admitted that no exception was taken to the instruction to the jury at the time, we have presented it to this Court under the rules cited by us in our opening brief, and again in this brief, that while no specific objection or exception was noted during the trial to the Court's conduct; in the exercise of a sound discretion the Appellate Court will notice error in the trial of a criminal case even though the question was not properly raised in the trial.

Crawford v. United States;
Wiborg v. United States, 163 U. S. 632;
Strader v. United States, 72 Fed. (2d) 589 (593);
Peter v. United States, 23 Fed. (2d) 659 (660).

We, therefore, submit that when an Appellate Court can get the picture of Government counsel presenting evidence and facts over appellant's objection, and the Court

in apparent aid to the prosecution, uses the language used here; it is all part of a mosaic, that taken in its entirety presents the scene. That scene in its entirety shows the error. It is well to again point out that when Dr. Clark, as well as other Government medical experts, testified that "when you put a drug on the market with certain labels to cure certain diseases, that it is doing the patient a lot of harm, if the statements are in any manner false or misleading that all patent medicines come under that head," and the Court thereafter commented to the jury that "there are none so credulous as sufferers from disease" and that "fradulent misrepresentations of the curative value of those drugs not only operates to defraud the purchasers but is a distinct menace to the public health" and that "it necessitates legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstating the effects of worthless mixtures on which the sick will rely while their diseases progress unchecked," it could not fail to have its effect upon the minds of a jury into which had been hammered for a week, the belief of the allopathic physicians that these remedies were worthless (even though all the allopaths admitted they had never used them). A jury that had heard comparisons of the products made to "a glass of milk"; that had heard the therapeutic effect compared to a product such as milk (with a comparison of the price of the medicine with the price of a glass of milk); with the repeated and invidious injection into the evidence of the profit made by the appellant upon these articles or medicines, which could be obtained (according to the Government) in so much better a form as liquid, viz., as milk, then we submit we have shown that our contention is not lightly or frivolously made. We have not lightly nor frivolously contended that counsel for the Government and the trial judge (for both

of whom we have the deepest personal respect), permitted the rights of the appellant to be materially prejudiced by their attitude before the jury.

Certainly Government counsel has nowhere pointed out in his brief that the trial court gave a favorable instruction or made a favorable comment to offset or balance the act of the Court in reading President Taft's message to the jury.

With Reference to the Reply of the Appellee to the Error in Allowing Literature in Evidence Under the Cross-Examination of Beatrice Lyon. (Appellee's Brief, pp. 31-33.)

Let us state that our reply to the argument that the introduction of all the literature was prejudicial and without sufficient basis in law for its admission. We refer to the authorities cited under our reply to the contention about "intent" heretofore in this brief; and in our opening brief and original argument upon that point to the point that the evidence was inadmissible. We have only this to add; that the Government was allowed to cross-examine this witness upon literature which was not referred to in her testimony in chief; and also the Government was allowed to examine her upon distribution of the literature within recent months. Then the Court restricted the appellant in her attempt to secure evidence by this witness that this witness had interviewed a number of customers upon all of the products charged in the information, and had received no complaints. We have heretofore pointed out that such evidence was properly admissible under a different section in this reply brief. We believe that despite its self-serving character under the rule cited in the *Chichester Medicine* case, it should have been permitted and that it was error to exclude it as it tended to show the element of good faith of the appellant.

The Concluding Response of the Appellee Is to Our Contention That the Court Imposed a Sentence That Was Too Severe.

Counsel does not reply to our contention that the fine of $1,000.00 for the shipment of these several articles which really constituted two or three single shipments, but were divided into several counts by the Government, is severe. The language of the Court at the time of sentence was that the Court considered the appellant a flagrant violator of the law. While that language does not appear in the Bill of Exceptions, it nevertheless was the statement of the Court at the time of sentence as we believe Government counsel will admit, although his brief is silent upon the amount of the fine. While we admit that there is statutory authority for the imposition of costs, it is contrary to the practice in this jurisdiction to award costs, and we do not believe that the circumstances in this case warranted the imposition of costs in view of the fine. It must be remembered that the appellant had paid a severe penalty at the time of the libel upon her goods and a fine commensurate to the offense should have been considerably less than the one imposed. Not only was the award of costs improper, but the costs when awarded included traveling expense for Dr. Hoover, a distance of 5,900 miles and subsistence expense for thirteen days, although he was not an employee of the Government; traveling expense for Ernest H. Grant, a chemist for the Government, a distance of 6,528 miles at a cost of $326.40; traveling expenses for 808 miles at $40.40 for Edgar O. Eaton, Government chemist traveling expense for George L. Keenan, 5,900 miles, at an expense of $295.00; and traveling expense of George P. Larrick, 5,900 miles, at an expense of $295.00, or an excessive award for mileage and traveling expenses in the guise of costs of $1,226.80

so that in any event the costs awarded are excessive and should have been assessed at not to exceed the sum of $273.00, if they were to be allowed at all.

Conclusion.

We, therefore, respectfully submit that the Government has failed to prove a *prima facie* case warranting the verdict of the jury in the first instance. We must respectfully urge and earnestly contend that the judgment herein is as to the appellant clearly erroneous and that it should be and must be reversed by this Honorable Court. We further respectfully contend that the appellee has utterly and completely failed to answer or refute by satisfactory argument or proper authority our contention that errors prejudicial to the appellant clearly appear upon the record and upon the basis of the authorities cited by this appellant in her opening brief. We, therefore, respectfully submit that since this is not one of those cases where the offense has been clearly shown to have been committed; not one of those instances where technical errors are relied upon, but where substantial errors have prejudiced vital rights; that since it is one of those cases where a question of fact is relied upon for the proof of crime, and the evidence is certainly substantially in favor of this appellant, and she might well have been acquitted except for the prejudicial error; that for the reasons stated upon the grounds enumerated and set forth both in this brief and in appellant's opening brief, the judgment should be reversed by this Honorable Court with the directions to dismiss.

Respectfully submitted,
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Attorneys for Appellant.